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No. 06-223

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In the

Supreme Court of the United States

JOHN DREBICK and JANE DOE DREBICK,
husband and wife, d/b/a DREBICK INVESTMENTS,

Petitioners,

v.

CITY OF OLYMPIA, a Washington code city,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a local government avoid the "nexus " and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions in the form of "impact" fees?

2. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by imposing development exactions by legislative enactment?

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners John Drebick and Jane Doe Drebick, husband and wife, d/b/a Drebick Investments (Drebick), respectfully file this reply to the opposition to Petition for Writ of Certiorari (Opp.) filed by Respondent City of Olympia.

INTRODUCTION

Respondent argues that revenue raising measures imposed under a government's taxing authority, impact fees, "and other similar 'user fees' are not subject to constitutional takings analysis."[1] Opp. at 9-10. But, the fee assessed on Drebick's project as a condition to the issuance of a permit to build a new office building is an exaction; it is not a tax or a user fee. An exaction may require the dedication of land or a real property interest, the payment of fees, or the financing of public improvements. *See Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (referring to an assessment against property for improvements to abutting road as an exaction). "Generally, any requirement that a developer provide or do something as a condition of receiving municipal approval is an exaction." Daniel S. Huffenus, Dolan *Meets* Nollan: *Towards a Workable Takings Test for Development Exactions Cases*, 4 N.Y.U. Envtl. L.J. 30, 33 (1995). This Court in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), reinforced the fact that "[a] distinct category of regulatory takings may occur when the government conditions the granting of permit approval, plat approval, or

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[1] Respondent incorrectly cites *New Castle Investments v. City of LaCenter*, 989 P.2d 569, 575 (Wash. Ct. App. 1999), for the proposition that "Washington courts have expressly acknowledged that impact fees are not regulatory, but are essentially revenue-raising taxes." Opp. at 11. What the *New Castle Investments* court said is "[w]e do not hold that these fees are taxes, but only that these fees do not fall within the vesting statute as 'land use control ordinances.'" 989 P.2d at 575.

some other type of governmental approval on an exaction from the approval-seeking landowner." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 71 S.W.3d 18, 30 (Tex. Ct. App. 2002) (footnote omitted).

I

THIS COURT HAS NOT RULED ON EITHER OF THE IMPORTANT QUESTIONS OF FEDERAL TAKINGS LAW PRESENTED IN DREBICK'S PETITION

The nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), are important safeguards of private property rights. The critical role of these tests in regulatory takings law was recently affirmed in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528. *Lingle* states that the nexus and rough proportionality standards form one of the four regulatory takings theories recognized by this Court. *Id.* at 548. *Lingle* was not an exactions case. Nor did the ruling in that case affect takings precedent related to exactions (also referred to as conditions of development). *See* Opp. 2-3 & nn.6-7, 11-14. "*Nollan* and *Dolan* cannot be characterized as applying the 'substantially advances' test we address today, and our decision should not be read to disturb these precedents." *Lingle*, 544 U.S. at 548.

The splits of authority described in Drebick's petition were not created by *Lingle* (*see* Opp. at 2). The debate among the lower courts regarding the scope of *Nollan* and *Dolan* has existed for years. *See, e.g.*, Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 Stetson L. Rev. 675, 704 (2000). *Lingle* did not resolve the questions presented in

this Petition, nor did any other decision of this Court.[2] *See* Opp. at 3 n.5.

Respondent argues that *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), precludes the application of *Dolan* to a development fee. Opp. at 2-3 & n.5. But that case did not address the issue of excessive exactions. In *City of Monterey v. Del Monte Dunes*, this Court questioned the extension of *Dolan*'s rough proportionality test to permit denials. Rough proportionality is an unhelpful standard when addressing a permit denial. In *Dolan*, the standard made sense: the City there could calculate the traffic impact created by Mrs. Dolan's enlarged store and it could assess the proportionate amount by which a bicycle trail could reduce the impact. But such an approach is not useful in assessing whether a permit denial fails to substantially advance a legitimate governmental interest—after all, how does one determine whether a permit denial is roughly proportional to anything? As this Court said, the proportionality standard

> was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is *based not on excessive exactions but on denial of development.* We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. at 703 (emphasis added).

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[2] Respondent also includes several cites to *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). Neither was an exactions case and neither discussed the applicability of *Nollan* or *Dolan* to the various sorts of conditions on development (fees vs. dedications of land; legislative vs. individually or adjudicatively imposed exactions).

See City of Olympia v. Drebick, 83 P.3d 443, 451 (Wash. Ct. App. 2004) ("[A] *Dolan* proportionality analysis was inapposite in *Del Monte Dunes* because the government did not exact land or money.").

II

RESPONDENT'S OPPOSITION ILLUMINATES THE ISSUES THAT CREATE A NATIONWIDE SPLIT OF AUTHORITY AMONG THE LOWER COURTS

The split of authority described in the Petition exists because some courts seek to limit *Nollan* and *Dolan* to their facts, and other courts conclude that *Nollan* and *Dolan* advance broader constitutional takings principles intended to prevent a minority of citizens from shouldering a disproportionate share of public burdens. While the specific facts of both *Nollan* and *Dolan* related to the transfer of real property, there is no consensus about whether the nexus and rough proportionality standards should be limited to such transfers of real property or, as Respondent argues, the "direct analog of a dedication requirement." Opp. at 24. As the recipient of moneys exacted from property owners, Respondent naturally argues that the Court should limit the scope of *Nollan* and *Dolan*.

The cases cited by Respondent do not support its claim that lower courts have only expanded *Dolan*'s rough proportionality analysis to monetary exactions that are a direct analog of a dedication requirement. *See* Opp. at 24-25. The Oregon Court of Appeals, in *Dudek v. Umatilla County*, 69 P.3d 751, 757 (Or. Ct. App. 2003), admitted that "the question of under what circumstances the heightened scrutiny imposed by *Dolan* applies to exactions that are monetary in nature is a complex question and is not completely resolved." The *Dudek* court concluded that it was not necessary to resolve the question of *Dolan*'s application to pure monetary exactions in that case. *Dudek*, 69 P.3d at 758. Nor has the California Supreme Court

limited the applicability of *Nollan* and *Dolan* to a narrow range of development fees intended as an alternative to the dedication of real property. In *Ehrlich v. City of Culver City*, 911 P.2d 429, 449 (Cal. 1996), the court found that the City of Culver City could not require the property owner to dedicate property to replace lost private recreational facilities. However, the City could mitigate the loss of a specific recreational facility by requiring a fee to defray the expenses involved in "attracting the development of comparable private recreational facilities for [the city's] residents." *Id.* at 450. The court applied the *Nollan* and *Dolan* standards to the development fee in *Ehrlich*, explaining that "it matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction." *Ehrlich v. City of Culver City*, 911 P.2d at 444.

Respondent makes the remarkable claim that no federal or state court has ever applied *Nollan* and *Dolan* to legislatively adopted, generally applicable impact fees. Opp. at 14. That is simply not true. Drebick discusses five courts that have met or exceeded the heightened scrutiny required by *Nollan and Dolan* when deciding the constitutionality of legislatively imposed exactions. Petition at 16-17. The most recent and well-reasoned decision on the issue came from the Supreme Court of Texas. Although the Texas court refused to adopt a bright line rule in *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 642 (Tex. 2004), it applied a nexus and rough proportionality analysis to the fee at issue in that case. The fee was legislatively adopted (pursuant to the Town's Land Development Code), and it was applicable to all builders and developers as a condition of development. *Id.* at 623-24.

The decisions in *Town of Flower Mound* and the others cited in the Petition are entirely consistent with this Court's decision in *Dolan*. All but one of the cases relied on by the *Dolan* majority in formulating the "rough proportionality" test involved municipal ordinances—legislation of general

applicability—requiring developers to dedicate property or cash to help finance the construction of public facilities. *See Dolan v. City of Tigard*, 512 U.S. at 400 (Stevens, J., dissenting). "In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment." *Id.* And see Petition at 27, explaining that both *Nollan* and *Dolan* involved a mixture of legislative and adjudicative government action.

III

LOCAL GOVERNMENTS MUST MEET THE *NOLLAN* AND *DOLAN* STANDARDS FOR ALL DEVELOPMENT EXACTIONS, REGARDLESS OF THE FORM OF THE EXACTION OR THE MANNER BY WHICH IT IS IMPOSED

Respondent argues that impact fee ordinances have "built-in protections to prevent the kind of extraordinary practices that concern Drebick, and to ensure compliance with constitutional standards." Opp. at 22-23. Yet, throughout its Opposition, Respondent discusses standards that do not ensure compliance with the federal constitutional standards set by *Nollan* and *Dolan*. Respondent advocates standards that require new development to pay a share of the cost of new facilities necessitated by all new development regardless of the impact of a single new development project on public facilities (Opp. at 4, 6-7 & n.13), and claims, without citation, that local governments generally require that the fees they impose bear a reasonable relationship to the development seeking approval (Opp. at 23). These sorts of "built-in protections" do not protect property owners from the kind of extortionate exactions that this Court described in *Nollan* and *Dolan*.

> Absent judicial enforcement of the takings clause, governments have every incentive to take private property without compensation. Democracy will deter such wealth redistribution only when large

> numbers of people are likely to bear the costs. The takings clause exists, along with the rest of the Bill of Rights, because the constitutional framers understood the inevitability of the tyranny of the majority in an unlimited democracy.

James L. Huffman, *Colloquium on* Dolan v. City of Tigard: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 146 (1995) (footnote omitted).

CONCLUSION

For these reasons the petition should be granted.

DATED: September, 2006.

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